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No. 87-254

In the Supreme Court of the United States

October Term, 1987

DAVID W. SMITH, III,

Petitioner,

v.

JAMES G. MARTIN, in his capacity as Governor of the State of North Carolina; LACY H. THORNBURG, in his capacity as Attorney General of the State of North Carolina; FRANKLIN E. FREEMAN, JR., in his capacity as Director of the Courts of the State of North Carolina; TIMOTHY L. PATTI; ROBERT W. CLARK; and WILLIAM J. ALLRAN, III,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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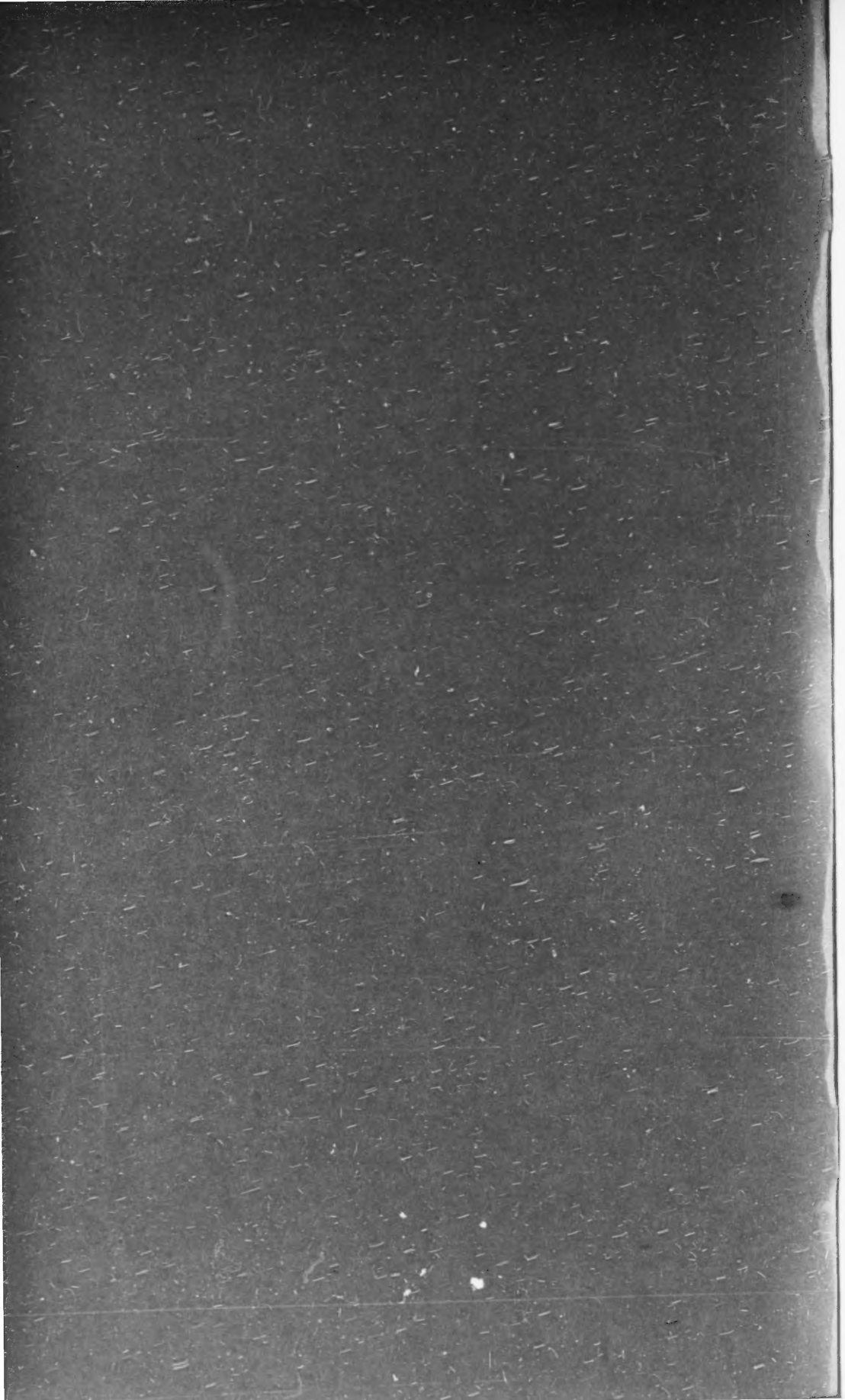

QUESTIONS PRESENTED

I. DO THE PRINCIPLES ENUNCIATED BY THIS COURT IN ***BRANTI V. FINKEL,*** 445 U.S. 507 (1980) APPLY TO THE APPOINTMENT OF JUDGES BY THE GOVERNOR OF THE STATE OF NORTH CAROLINA?

North Carolina submits the answer is No!

II. DOES THE APPLICATION BY THE FOURTH CIRCUIT COURT OF APPEALS OF ***RODRIQUEZ V. POPULAR DEMOCRATIC PARTY,*** 457 U.S. 507 (1982) TO JUDICIAL VACANCIES PRESENT AN IMPORTANT CONSTITUTIONAL QUESTION?

North Carolina submits the answer is No!

III. DOES THE FOURTH CIRCUIT COURT OF APPEALS HOLDING THAT A RESIDENT VOTER HAS NO RIGHT UNDER NORTH CAROLINA LAW TO BE ELIGIBLE TO APPOINTMENT TO STATE OFFICE CONFLICT WITH RULINGS OF THE NORTH CAROLINA SUPREME COURT?

North Carolina submits the answer is No!

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No. 87-254

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JAMES G. MARTIN, in his capacity as Governor of the State of North Carolina; LACY H. THORNBURG, in his capacity as Attorney General of the State of North Carolina; FRANKLIN E. FREEMAN, JR., in his capacity as Director of the Courts of the State of North Carolina; TIMOTHY L. PATTI; ROBERT W. CLARK; and WILLIAM J. ALLRAN, III,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

James G. Martin, Governor of the State of North Carolina, Lacy H. Thornburg, Attorney General of the State of North Carolina, Franklin E. Freeman, Jr., Director of the Courts of the State of North Carolina, and Timothy L. Patti, Robert W. Clark, and William J. Allran, III, all respectfully pray that the petition for writ of certiorari of David W. Smith, III, be denied.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is accepted except as hereafter noted.

Article IV, §22, of the North Carolina Constitution provides that only persons duly authorized to practice law in the courts of this State shall be eligible for election or appointment as a Justice of the Supreme Court, Judge of the Court of Appeals, Judge of the Superior Court or Judge of District Court, except for persons elected to or serving in such capacities on or before January 1, 1981. (Appendix to Petition, p. 17)

Smith was not eligible for nomination by the District Bar pursuant to the provisions of N.C. Gen. Stat. §7A-142, because he was a Republican and the vacating judge had been elected as a nominee of the Democratic party. The record is silent as to whether or not there might be other reasons why Smith might not be appointed. Specifically, Smith has never alleged or proved that: even if he were declared eligible for nomination by the district bar, he would be nominated by that body; or, if nominated, he would be the Governor's choice from the list of nominees.

Smith has never alleged that he submitted his name to either the District Bar or the Governor as an interested applicant. Also, Smith has never alleged that any member of the District Bar placed his name in nomination for appointment to the vacant judgship.

Smith could be appointed district court judge if: (1) the district bar, after determining that petitioner desires the appointment, decides not to nominate anyone for the post, and (2) Smith is the Governor's choice for the judgeship. It is well settled North Carolina law that where the language of a statute permits, the courts must adopt the construction that would render the statute constitutionally valid. See, ***Rhodes v. Asheville***, 230 N.C. 137, 159 S.E. 2d 313 (1949). The directions given by the North Carolina legislature to the district bar could easily be construed to be "recommendatory", rather than obligatory. Compare ***State ex rel. Cole v. Sanders***, 174 N.C. 112, 93 S.E. 2d 476 (1917) (directions in statute held to be "recommendatory").

One of the respondents, Timothy L. Patti, has been appointed district court judge by the Governor while this case was pending in the courts. See Volume 214, ***North Carolina Reports***, page xi, or Volume 78, ***North Carolina Court of Appeals Reports***, page xi.

In a case involving the same factual situation as here, the North Carolina Supreme Court declared the action moot. See, ***Pearson v. James G. Martin, Governor, et. al.***, ____N.C.____, 355 S.E. 2d 496, ***reh. den.***, ____N.C.____, 356 S.E. 2d 789 (1987).

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

Respondents argue in opposition to the petition for the writ of certiorari that the decision of the Fourth Circuit of Appeals does not indicate a conflict with other circuit courts as to whether the principles enunicated in ***Branti v. Finkel***, 445 U.S. 507 (1980), should apply to judicial appointments. Rather, the decision demonstrates a justified reliance on the decision of this Court in ***Rodriquez v. Popular Democractic Party***, 457 U.S. 1 (1982).

Respondents also argue that no substantial Constitutional question is presented regarding whether ***Rodriquez*** should apply to the filling of judicial vacancies, and that a North Carolina resident voter has no right under State law to be eligible to appointive office in North Carolina.

ARGUMENT

I. THE FOURTH CIRCUIT'S APPROVAL OF THE NORTH CAROLINA STATUTE IN QUESTION REPRESENTS A JUSTIFIED RELIANCE ON THE DECISION OF THIS COURT IN ***RODRIQUEZ v. POPULAR DEMOCRATIC PARTY,*** 457 U.S. 1 (1982), RATHER THAN SIGNALING A CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE PRINCIPLES ENUNICATED IN ***BRANTI v. FINKEL,*** 455 U.S. 507 (1980) SHOULD APPLY TO JUDICIAL APPOINTMENT

By its decision below, the Fourth Circuit has, at most, condoned the use of political party affiliation as a prerequisite in filling a judicial vacancy for the unexpired term of the vacating judge, if the vacating judge had originally been elected as the nominee of a particular political party. ***Rodriquez v. Popular Democratic Party, et. al.***, 457 U.S. 1 (1982) is sufficiently similar on its facts to sustain the validity of N.C. Gen. Stat. §7A-142, the statute in question.

In ***Rodriquez***, this Court, in a unanimous decision, ***held*** that with respect to the unexpired term of a former member of the Popular Democractic Party, who vacated his elective legislative office, Puerto Rico could, without violating the First Amendment, exclude members of an opposition political party from the process of appointing his replacement. Like the Puerto Rican statute, N.C. Gen. Stat. §7A-142 obivates the cost of a special election and preserves the party preferences of the voters from one election to the next.

All voters cannot be sufficiently acquainted with the qualifications of competing candidates for election to the legislature and the judiciary. Many must necessarily vote on the basis of party affiliation. Since N.C. Gen. Stat. §7A-142 preserves the local district voters' wishes as to the party affiliation of the office holder for the interim period between elections, the ap-

pointee's chances of winning the next election are enhanced, because he is a member of the most popular political party as well as being supported by the local bar.

In districts where Republicans are in the majority, the statute has the same effect, i.e., a governor in filling judicial vacancies is prevented from shutting out members of a statewide minority party (as in North Carolina) that enjoys a majority in the local judicial district. The statute thus exerts a stabilizing influence on the judiciary and encourages qualified candidates to seek the appointment. Such service to legitimate governmental concerns is sufficient to sustain N.C. Gen. Stat. §7A-142, without considering whether or not the statute also supports activities also protected by the Constitution, such as encouraging political activity or strengthening political parties.

The burden, if the statute imposes any, on protected activity, is only an incidental consequence of other legitimate governmental concerns, and the statute is not subject to a high degree of scrutiny. *Compare,* ***Keyishian v. Board of Regents***, 385 U.S. 589 (1967).

The effect of N.C. Gen. Stat. §7A-142 on the petitioner is entirely conjectural. The statute becomes relevant only on the occurrence of an uncertain and unpredictable event, a vacancy in the office of district judge. Then, to obtain appointment to the vacant judgeship, the interested attorney may have to obtain not only preferment by the Governor, but the nomination of the district bar as well. Because of the presence of many other unpredictable extraneous factors, such as the number of other interested candidates, Smith has not even attempted to show that he can meet the appropriate standard of proof enunciated in ***Elrod v. Burns, 427 U.S. 347 (1976)***, i.e., he has not shown he would be unacceptable "solely for the reason that [he is] not sponsored by the Democractic Party". ***Branti v Finkel***, 445 U.S. 507, 517 (1980).

Not all restrictions imposed by the states on rights to associate impose constitutionally suspect burdens -- only those

having a substantial impact. ***MacQuire v. Houston***, 717 P. 2d 948, 952-953 (Colo. 1986); Cf. ***Avery v. Jennings***, 786 F. 2d 233, 236 (6th Cir. 1986) cert. denied, 106 S. Ct. 3276 ("Although the informal hiring practices in question here place some burden on the associational rights of prospective job applicants, that burden does not rise to the level of a constitutional deprivation"). The burden, if any, imposed by this statute does not rise to the level of a constitutional deprivation. *Compare*, ***Pollard v. City of Chicago***, 643 F. Supp. 1244, 1254-1255 (N.D. Ill. 1986).

II. PETITIONER FAILS TO DEMONSTRATE THAT THERE IS AN IMPORTANT CONSTITUTIONAL QUESTION REGARDING THE APPLICATION OF ***RODRIQUEZ v. POPULAR DEMOCRATIC PARTY***, 457 U.S. 507 (1982) TO THE AREA OF JUDICIAL APPOINTMENTS.

Judges, like legislators, have to be selected by someone. "[Y]ou can't take politics out of politics". ***Craig v. Celeste***, 646 F. Supp. 47, 49 (S.D. Ohio 1986). The study cited by petitioner, Dubois, ***State Trail Court Appointments: Does the Governor Make a Difference?***, 69 ***Judicature*** 20, (Petitioner's Brief, p. 18) purports to show that "a study of the interim appointees of three California governors shows a preference for individuals who share their partisan and ideological disposition".

The same is no doubt true with respect to appointments to the federal bench. See Abraham, ***Justices & Presidents: A Political History of Appointments to the Supreme Court***, p. 65 (2nd ed. Oxford, 1985).

In the case at bar, pursuant to the provisions of the statute, judicial appointments may be based in part on the political party preference of the majority of voters in a particular district. Otherwise, the unbridled discretion of the Governor will control. In either event, of course, politics and political party affiliation will play a significant role. And while reasonable men can certainly disagree as to the correct answer to the question

of whether a state's interest is better served by the partisan selection of judges, the answer is certainly not dictated by the United States Constitution.

III. THE FOURTH CIRCUIT'S HOLDING THAT A NORTH CAROLINA RESIDENT VOTER HAS NO RIGHT UNDER STATE LAW TO BE ELIGIBLE TO APPOINTMENT TO STATE OFFICE DOES NOT CONFLICT WITH THE RULINGS OF THE NORTH CAROLINA SUPREME COURT.

The decisions of the North Carolina Supreme Court cited by petitioner to support his argument are based on the Constitution of North Carolina prior to its amendment in 1970. Moreover, these decisions do not deal with a factual situation where the legislature prescribed additional qualificiations for appointment to office.

The present position of the North Carolina Constitution dealing with the subject matter of petitioner's complaint is Article VI, Section 6, which states that all voters shall be eligible for election to office.

According to the petitioner, this provision should be interpreted to make all voters eligible to appointive office as well. Petitioner's interpretation achieves the absurd result of prohibiting the legislature from imposing on prospective appointees for state positions any qualification other than "resident voter", regardless of the state's need for doctors, lawyers or qualified secretaries.

Fortunately, questions of constitutional construction are in the main governed by the same principles which control in ascertaining the meaning of all written instruments. ***Perry v. Stancil***, 237 N.C. 442, 75 S.E. 2d 512 (1953). Among these principles is the "plain meaning rule". See ***State ex rel. Utilities Commission v. Edmisten***, 291 N.C. 451, 232 S.E. 2d 184 (1977). This rule properly restricts the scope of Article VI, Section 6,

of the North Carolina Constitution to qualifications for election to office.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted, this the 3rd of September, 1987.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served three copies of the foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT on the follwoing parties in interest by depositing a copy thereof in the care and custody of the United States Postal Service, first-class, postage prepaid, addressed to said parties at their last known address as listed below in the manner prescribed by law:

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